In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported in *The Maui*, 113 Fed. (2d) 1018. The opinion also ap-

pears at pages 482-488 of the record. The District Court rendered no opinion, but the Findings of Fact signed by it appear on pages 428-446 of the record.

II.

JURISDICTION OF THIS COURT.

A full statement of the jurisdiction of this Court has been given under heading "B" in the foregoing Petition, page 5, supra, and, in the interest of brevity, is not repeated at this point.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" in the foregoing Petition, page 2, supra, and, in the interest of brevity, is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

1. In holding that respondent was exempt from liability for damage to petitioners' cargo by virtue of bill of lading exceptions against damage due to detention, delay, prolongation and strikes, although respondent failed to prove that it had exercised due diligence to make

the MAUI in all respects seaworthy or that any unseaworthiness did not contribute to the damage, as required by the applicable law.

2. In holding that respondent was exempt from liability for damage to petitioners' cargo by virtue of a bill of lading exemption against damage due to the inherent vice or nature of the goods, although respondent failed to prove that it had exercised due diligence to make the MAUI in all respects seaworthy, as required by the applicable law.

3. In holding that the MAUI was not unseaworthy although she was navigated without her full required crew, contrary to a federal statute, 46 U.S. Code, Section 222, Revised Statutes, Section 4463, as amended.

4. In holding that respondent was not liable to petitioners for the damage to their cargo although respondent failed to prove that its violation of a federal statute, 46 U.S. Code, Section 222, Revised Statutes, Section 4463, as amended, could not have contributed to the damage, as required by the applicable law.

5. In failing to render and enter a decree in favor of petitioners and against respondent for the amount of their damages, interest and costs.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A. The decision of the Circuit Court of Appeals that a common carrier may rely upon bill of lading exceptions to exempt itself from liability for damage to cargo without first proving the exercise of due diligence to make its vessel in all respects seaworthy, or that unseaworthiness did not cause the damage, is in direct conflict with decisions of this Court and of other Circuit Courts of Appeal in which such proof was held to be essential.

Point B. The decision of the Circuit Court of Appeals that a common carrier may, without proof of due diligence to make its vessel in all respects seaworthy, rely upon an unconditional exception in its bill of lading to exempt itself from liability for a cause of damage to cargo for which exemption is granted under the third section of the Harter Act only upon the express condition that such diligence be exercised, is in conflict with a decision of this Court.

Point C. The decision of the Circuit Court of Appeals that a vessel which is navigated without her full crew, contrary to a statute of the United States, is not unseaworthy, and that the carrier is not liable for damage to cargo although it failed to prove that such statutory violation could not have contributed to the damage, is in conflict with decisions of this Court and other Circuit Courts of Appeal.

POINT A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A COMMON CARRIER MAY RELY UPON BILL OF LADING EXCEPTIONS TO EXEMPT ITSELF FROM LIABILITY FOR DAMAGE TO CARGO WITHOUT FIRST PROVING THE EXERCISE OF DUE DILIGENCE TO MAKE ITS VESSEL IN ALL RESPECTS SEAWORTHY, OR THAT UNSEAWORTHINESS DID NOT CAUSE THE DAMAGE, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL IN WHICH SUCH PROOF WAS HELD TO BE ESSENTIAL.

It is established law that proof by a cargo owner that his goods were received by the carrier in good order and condition and delivered in bad condition or not delivered at all makes out a prima facie case of liability against the carrier.

> *The Folmina,* 212 U.S. 354, 361, 53 L. Ed. 546, 550;
> *Schnell v. The Vallescura,* 293 U.S. 296, 303, 79 L. Ed. 373, 377.

It follows, and it is equally well established, that the carrier has the burden to prove that the loss was due to a cause for which it may validly exempt itself from liability by law or by contract.

> *Schnell v. The Vallescura,* supra, page 304.

In the case at bar, the carrier relies exclusively upon exceptions contained in its bills of lading to exempt itself from liability (R. 19, 483).

Respondent does not dispute the foregoing statements of law. But it contends that if it shows that the loss was apparently due to a cause for which exemption from liability is granted by its bill of lading, the carrier is exonerated from liability unless the cargo owner can prove

that the loss was in reality due to the carrier's negligence. In proving that the loss was apparently due to a contractually excepted cause, respondent claims that it need not prove that it had exercised due diligence to make its vessel seaworthy or that any lack of such diligence did not contribute to the damage. On the other hand, petitioners contend that the carrier must prove, as an *element* in showing that the loss was due to an excepted cause, that due diligence had been exercised to make the vessel in all respects seaworthy, or, if there was failure of such diligence in any material particular, that such failure did not contribute to the damage.

As stated in the opinion there is no evidence in the record that the MAUI was in any respect seaworthy or that due diligence had been exercised to make her seaworthy (R. 486).

1. Conflict of Decisions.

The Circuit Court of Appeals held herein as follows (R. 486):

> "Although they have not suggested any item of unseaworthiness — aside from lack of crew — which might be thought contributory to the loss, appellants contend that before a bill of lading exemption is available to appellee it must first prove that the MAUI was in all respects seaworthy, or that due diligence had been exercised to make her so. The rule is said to be established by Martin v. The Southwark, 191 U.S. 1, and other decisions cited, most of which are by the lower federal courts. We think otherwise."

The Circuit Court of Appeals thus apparently concedes that its ruling creates a conflict with other decisions. In

Martin v. The Southwark, 191 U.S. 1, 48 L. Ed. 65, the shipper filed a libel for damage to a cargo of fresh meat, shipped under refrigeration, which had arrived at destination in a rotting and deteriorated condition due to breakdown of machinery. The bill of lading excused the carrier from liability for loss, delay, or damage, however arising, including all risks of breakdown of machinery. The carrier contended that in view of the fact that the cause of damage was excepted by the bill of lading, the shipper could not recover unless negligence on the part of the carrier was proved. The District Court and Circuit Court of Appeals sustained the contention of the carrier. This Court in reversing the lower Courts said, page 12:

> "In the District Court, which judgment was affirmed by the Circuit Court of Appeals, it was held that the burden of proof, in view of the stipulation of the bill of lading in this case, was not upon the carrier, but upon the shipper and that there could only be a recovery in the event that the shipper had shown, by satisfactory evidence, negligence upon the part of the carrier. This case was decided before the opinion was delivered in the case of *International Nav. Co. v. Farr,* 181 U.S. 218; 45 L. Ed. 830, and upon this point is in direct opposition thereto, and fails to give proper weight to the provisions of the act making it incumbent upon the carrier to use due diligence to provide a seaworthy vessel."

This Court had, even prior to *Martin v. The Southwark,* supra, stated the same rule. In *Bradley Fertilizer Co. v. The Edwin I. Morrison,* 153 U.S. 199, 211, 38 L. Ed. 688, 692, the Court said:

> "Perils of the sea were excepted by the charter-party, but the burden of proof was on the respond-

ents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants contributed."

Negligence was not proved, but the carrier was held liable because its proof of seaworthiness was not satisfactory. Other Circuit Courts of Appeal have held the carrier must prove seaworthiness or due diligence to rely on a bill of lading exception.

In *The Thomas P. Beal,* 11 Fed. (2d) 49, 51 (3 C.C.A.), the carrier relied on a bill of lading exception against leakage, and the Court said:

> "When sued by a shipper for damage to cargo, the ship (or a time charterer) cannot rely alone upon an exception in the contract of affreightment but, before availing itself of the exception, must sustain the burden of proving its primary obligation of seaworthiness in stowing the cargo in a berth reasonably fitted for cargo of that kind."

In *The Benjamin Noble,* 244 Fed. 95, 98 (6 C.C.A.), affirmed 249 U.S. 334, the Circuit Court of Appeals said, in holding that the carrier had the burden of proof to establish the exercise of due diligence to make its vessel seaworthy:

> "* * * The fact that the bill of lading contained a provision excepting 'dangers of navigation, fire and collision' is not important. As Mr. Justice Day said in The Southwark, supra, 191 U.S. at pages 16, 17, 24 Sup. Ct. at page 6, 48 L. Ed. 65:

'To permit the stipulations of this bill of lading to cut down the statutory requirements of section 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute.' ".

In *The Skipsea,* 9 Fed. (2d) 887, 888 (2 C.C.A.), the Court said:

"The onions having been received by the ship at Valencia in good condition and having been delivered in New York in damaged condition, the burden rests upon the ship to explain this injury and condition, and to excuse itself as an accepted peril of the sea, or that it was free from fault or neglect. The appellee must assume and bear the burden of establishing that the vessel was seaworthy. The Southwark, 191 U.S. 1, 24 Sup. Ct. 1, 48 I. Ed. 65; Kaufer Co. v. Luckenbach S. S. Co. (D.C.) 284 Fed. 160."

There have been many District Court decisions on the point. In *Kaufer Co. v. Luckenbach S. S. Co.,* 294 Fed. 978 (W.D., Wash.), the damage to a shipment of candles was due to heat, a cause of damage exempted by the bill of lading. The shipper proved no negligence on the carrier's part, except a case of prima facie liability. The carrier proved the general seaworthiness of its vessel, but did not prove proper stowage. Judge Neterer stated, page 981:

"The Court also holds that the shipowner must show, among other things, the seaworthy fitness to carry the cargo undertaken, and that the discharge of this duty is not left to any presumption, *and that it is a condition precedent which must be shown before the exemption can be claimed.*

* * * * * * *

"To make a ship seaworthy for the cargo sought to be transported, it must be shown that the relation of the ship to the cargo at the inception of the voyage was such as to make it seaworthy and fit to carry the cargo; not only must the ship be in a general seaworthy condition, properly equipped, and manned, but the cargo must be stowed in such part of the ship as has been generally or specially provided for the particular class of cargo.

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"Proper stowage at the inception of the voyage not having been shown by the respondent, decree for libelant is directed" (Emphasis supplied).

The same Court, in passing on the pleadings in the same case, held that the carrier must plead seaworthiness before it could rely on bill of lading exemptions from liability, stating (284 Fed. 160):

"It is primer admiralty law that before the exemption is available to the respondent, it must be shown that the vessel was in all respects seaworthy."

In *Cafiero & Mencacci v. Navigazione Libera Triestina*, 50 Fed. (2d) 199, 202 (E.D.N.Y.), the Court held:

"While the burden of proof to show negligence rests upon libelant, yet, *before the respondent can avail itself of exceptions in its contract where merchandise is shown to have been received in good order and condition and delivered in bad order and condition, respondent must show a seaworthy vessel, and that the merchandise was properly stowed in a proper berth.* It must satisfactorily explain these matters. *Such proof cannot be supplied by speculation.* It has been said that a doubt in regard to these matters should be resolved in favor of the shipper" (Emphasis supplied).

In *American Co. v. U. S.*, 26 Fed. (2d) 468, 469 (S.D.N.Y.), the Court said:

> "Respondent argues that there is no obligation whatever upon the shipowner to show that he used due diligence to make the ship '*in all respects* seaworthy' in order to rely upon the exceptions in the bill of lading, as he would otherwise be bound to do when he relies upon the third section of the Harter Act to relieve him from the negligence of the officers in the navigation or management of the ship. Apparently respondent contends that Section 2 of the Harter Act provides for a lesser degree of diligence than that required by Section 3. To my mind, both sections cast the burden on the shipowner to exercise 'due diligence' to make the ship seaworthy. I cannot conceive of varying degrees of due diligence" (Emphasis by Court).

The same rule has been recognized by the California State Courts. In *Blake, Moffitt & Towne v. Steamship Co.*, 120 Cal. App. (Supp.) 775, 779, the Court said:

> "Such damage raised a presumption of unseaworthiness at the beginning of the voyage; and the burden was then cast upon the defendant to show affirmatively that due diligence was used to make the vessel in all respects seaworthy, and that the damage was proximately caused by a peril from the consequences of which defendant was exonerated by the provisions of the bill of lading and the federal statute."

The foregoing authorities establish a very important and direct conflict with the decision in the case at bar. We shall not, therefore, quote from additional decisions. But we do cite the following additional cases which con-

flict with the present decision and insert quotations therefrom in the Appendix, pages iii-v:

The Benjamin Noble, 232 Fed. 382, 389 (E.D., Mich.);

The Kensington, 88 Fed. 331, 333 (S.D.N.Y.);

The Agwimoon, 24 Fed. (2d) 864, 867 (D.C., Md.), affirmed under title *Atlantic Gulf & West Indies S. S. Lines v. Interocean Oil Company,* 31 Fed. (2d) 1006 (4 C.C.A.);

The Poznan, 276 Fed. 418, 431 (S.D.N.Y.);

The Cornelia, 15 Fed. (2d) 245, 247 (S.D.N.Y.).

2. The Reasons for Requiring the Carrier to Prove the Exercise of Due Diligence to Make his Vessel Seaworthy.

There are sound, definite reasons for the rule of proof established by the authorities cited above contrary to the decision of the Circuit Court of Appeals in the present case.

First, there is an implied warranty of seaworthiness in every contract of carriage by water.

Martin v. The Southwark, 191 U.S. 1, 6, 48 L. Ed. 65, 68;

The Carib Prince, 170 U.S. 655, 661, 42 L. Ed. 1181, 1186.

The carrier may by contract reduce this warranty of absolute seaworthiness to the exercise of due diligence to make seaworthy, but cannot avoid the duty to exercise such diligence by bill of lading exception or otherwise because of the express prohibition of Section 2 of the Harter Act (printed in Appendix).

The Carib Prince, supra, page 661.

Section 2 of the Harter Act does not merely prohibit the carrier from relieving itself by contract of the duty to exercise due diligence to make its vessel seaworthy, but it prohibits the carrier from inserting any agreement or covenant in its bill of lading whereby its obligation to exercise such diligence "shall in any wise be *lessened, weakened* or *avoided.*"

Surely, as a mere matter of common sense, if the effect of a bill of lading exception is to exempt the carrier from liability unless the cargo owner can prove that the carrier failed to exercise due diligence to make his ship seaworthy, the *obligation* of exercising such diligence is, to say the least, thereby lessened and weakened.

Martin v. The Southwark, supra, pages 16-17.

Second, the carrier must prove *the* cause, not merely *a* cause, of the damage to the shipper's goods.

Schnell v. The Vallescura, 293 U.S. 296, 306, 79 L. Ed. 373, 378.

For, delay, strikes, inherent nature of the goods, etc., relied upon by respondent herein as bill of lading exceptions, may be due to, or at least become operative, by reason of unseaworthiness or negligence just as well as by reason of causes beyond the carrier's control.

Third, the carrier knows the facts surrounding the loss, among which the fitness of the ship is of paramount importance. The shipper does not have such knowledge, and if he were required to furnish such proof, it would operate as a denial of justice.

Schnell v. The Vallescura, supra, page 304;
The Medea, 179 Fed. 781, 786 (9 C.C.A.).

3. The Reasoning of the Circuit Court of Appeals in the Present Case.

The opinion of the Circuit Court of Appeals herein gives no valid reason for its disagreement with the salutary rule of burden of proof established by this Court and other Circuit Courts of Appeal in the decisions cited above. On the contrary, it is clear that the opinion of the Circuit Court of Appeals is predicated on certain definite misconceptions.

First, the opinion herein states: "Appellee (the carrier) does not invoke the Harter Act (46 U.S.C.A. Secs. 190-192). It is not seeking statutory exoneration but relies on its contracts of affreightment" (R. 487).

Respondent does not, it is true, invoke the Harter Act, but respondent's contracts are *governed* by and *subject* to the provisions of the Harter Act. The very contention quoted above from the opinion was likewise made by the carrier in *Martin v. The Southwark,* 191 U.S. 1, 16, 48 L. Ed. 65, 72. This Court then said:

> "It is argued that appellees are not claiming the benefit of the Harter Act but rely upon the contract in the bill of lading to exempt them from liability in the absence of affirmative proof of negligence.
>
> *"To permit the stipulations of this bill of lading to cut down the statutory requirements of Section 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute"* (Emphasis supplied).

The Circuit Court of Appeals thus here holds valid the very contention which this Court has held to be invalid. The Circuit Court of Appeals overlooks the very obvious

fact that a carrier cannot evade the self-executing restrictions and prohibitions of the Harter Act by failing to invoke the Act. The restrictions of Section 2 of the Harter Act are not optional. The carrier is bound thereby whether it invokes the Act or not. The prohibitions therein contained are prohibitions imposed by law on the exemptions which the carrier can claim by contract. If, as already pointed out, the effect of a bill of lading exemption is to enable the carrier to avoid proof that it has exercised due diligence to make its vessel seaworthy, the obligation of exercising such diligence is certainly lessened and weakened, if not wholly avoided.

Second, the opinion of the Circuit Court of Appeals states that the trial Court found that no element of unseaworthiness contributed to the damage and that the facts clearly establish the delay due to strikes as the cause of damage (R. 487). We assume the Court regarded proof of such facts as essential to respondent's defense. Respondent also considered such finding essential, for it proposed such finding to the trial Court over petitioners' objection that there was no evidence on the subject in the record (R. 407-408). If such finding was essential, then the rule of proof, for which petitioners contend, must be conceded.

The flaw in the above statement of the Circuit Court of Appeals is that there is no evidence in the record that the vessel was in any respect seaworthy (R. 486). There is likewise no evidence that any unseaworthiness which may have existed did not cause the damage. The finding that the damage was not due to unseaworthiness is, therefore, simply an assumption predicated on the theory that

the carrier did not have to prove that its vessel was seaworthy. In other words, the opinion does not distinguish the rule of proof, it denies the rule. On the same state of proof, this Court stated in *Martin v. The Southwark*, supra, pages 12-13:

> "It is urged that the findings in both the District Court and the Circuit Court of Appeals, that the loss did not arise from want of proper refrigerating apparatus, but was due to a break-down in the machinery after the voyage was begun, are findings of fact in the courts below which should be held conclusive here. There are observations in the opinions of the learned judges consistent with the view that it was found that the loss was due to a breakdown in the machinery after the voyage had begun, and ordinarily such findings as to matters of fact are followed in this Court; *but the case below was tried on a theory which ignored the initial duty of the carrier to use diligence to provide a seaworthy vessel, properly equipped for the purpose intended. The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier*" (Our emphasis).

In the *Southwark* case, supra, there was *some* proof of due diligence to make the vessel seaworthy, but in the present case, there is *no* such proof at all.

The Circuit Court of Appeals states that unseaworthiness alone displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness (R. 487). But petitioners do not contend that respondent would be deprived of a proper bill of lading exemption

if its vessel were unseaworthy in a respect which did not cause the damage. Petitioners do contend that respondent must show that its vessel was in all respects seaworthy or that any existing unseaworthiness did not cause the damage. *The Court cannot, in the abence of proof, assume that unseaworthiness did not cause the loss.* The delay here may, so far as the record shows, have been due to unseaworthiness as well as to a strike.

The burden of proof is on the carrier. In *Philippine Sugar Agency v. Kokusai Kisen,* 106 Fed. (2d) 32, 36 (2 C.C.A.) Judge L. Hand said:

> "The burden of proof was on the ship to bring the sweat damage within the exception; if she undertook to show, as she did, that it was the weather which prevented her from ventilating the cargo, *obviously that presupposed proper equipment*" (Our emphasis).

The Circuit Court of Appeals states that when the carrier proved that the loss arose from an excepted cause, it discharged the burden resting immediately upon it, citing *The Malcolm Baxter, Jr.,* 277 U.S. 323, 72 L. Ed. 901, and *U. S. v. Los Angeles Soap Co.,* 83 Fed. (2d) 875 (9 C.C.A.). Neither of these cases discusses *what proof* is necessary to rely on a bill of lading exception. Both cases necessarily support the rule for which petitioners here contend. In *The Malcolm Baxter, Jr.,* supra, this Court did not allow the carrier to rely on any bill of lading exception *until* the vessel was shown to be seaworthy and it stated, page 333: "For the delay caused by the embargo *alone* petitioners may not recover * * *". The vessel there was liable for delay while she was unsea-

worthy, although the ship could not have sailed because of an excepted peril, even if she had been seaworthy. In *U. S. v. Los Angeles Soap Co.*, supra, the carrier assumed and pleaded the burden of proving that the vessel was in all respects seaworthy. The Court found upon affirmative proof that the vessel was seaworthy at the beginning of the voyage, page 879.

4. The Effect of the Decision of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals applies in every case brought in the Ninth Circuit where a cargo owner seeks recovery for damage to cargo and the carrier relies on exceptions in its bill of lading, subject to the Harter Act, to exempt itself from liability. The decision applies, therefore, to the usual cargo damage action, a great many of which are and will always be pending before Courts of Admiralty.

The need for uniformity of decision in admiralty causes, particularly when governed by a Federal statute, is obvious. The effect of the decision of the Circuit Court of Appeals has, however, even a more harmful effect than to disturb uniformity of decision.

The bill of lading of a common carrier by water contains an exception against almost every conceivable cause of damage. The shipper has no freedom of choice as to the contents of a bill of lading, as this Court stated in *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441, 32 L. Ed. 788, 792. For example, the present carrier's bill of lading contains exceptions against damage due to "water" and "steam" (R. 22). If the carrier can escape liability merely by proving that the

damage is due to water or steam, without having to prove that its vessel was seaworthy or that unseaworthiness did not contribute to damage from such causes, the cargo owner will rarely be able to recover even though in fact it was unseaworthiness of the vessel or negligence which permitted the water or steam to reach the cargo. The cargo owner ordinarily cannot prove either the condition of the vessel or how the damage occurred. The carrier not only does know these facts (or should know them) but he has warranted that he will exercise due diligence to make his vessel in all respects seaworthy.

In *Schnell v. The Vallescura,* 293 U.S. 296, 304, 79 L. Ed. 373, 377, this Court said:

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain, or explaining, bring within the exceptional case in which he is relieved from liability."

In *The Medea,* 179 Fed. 781, 786 (9 C.C.A.) the Court said:

> "The reason why the burden of proof is placed upon the carrier is that he or his servants know, or at least ought to know, the circumstances connected with the loss or damage to the cargo, while the owner of the lost or damaged goods has no such knowledge, and if he were required to furnish such proof it would operate as a denial of justice."

There is no hardship in requiring the carrier to prove that it has exercised due diligence to make its vessel seaworthy, or that its failure did not contribute to the damage. The carrier has agreed and the law requires it to exercise such diligence. But the rule requiring such proof does rightfully curb the carrier's opportunity of escaping liability for damage due to its fault.

POINT B.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A COMMON CARRIER MAY, WITHOUT PROOF OF DUE DILIGENCE TO MAKE ITS VESSEL IN ALL RESPECTS SEAWORTHY, RELY UPON AN UNCONDITIONAL EXCEPTION IN ITS BILL OF LADING TO EXEMPT ITSELF FROM LIABILITY FOR A CAUSE OF DAMAGE TO CARGO FOR WHICH EXEMPTION IS GRANTED UNDER THE THIRD SECTION OF THE HARTER ACT ONLY UPON THE EXPRESS CONDITION THAT SUCH DILIGENCE BE EXERCISED, IS IN CONFLICT WITH A DECISION OF THIS COURT.

The third section of the Harter Act (printed in appendix) provides that a carrier shall not be liable for certain specified causes of damage to cargo, provided it shall have exercised due diligence to make its vessel in all respects seaworthy. This Court has considered the effect of Section 3 in a number of decisions.

This Court has determined that a carrier cannot exempt itself from liability for a cause of damage specified in Section 3 unless it shall have proved affirmatively, as a condition precedent, that due diligence has been exercised to make the carrier's vessel in all respects seaworthy.

The Wildcroft, 201 U.S. 378, 388, 50 L. Ed. 794, 797.

This Court has also held that a carrier who has failed to exercise due diligence to make his vessel in *all* respects seaworthy, cannot exempt itself from liability for a cause of damage specified in Section 3 even though there be no causal relation between the lack of due diligence and the damage.

> *May v. Hamburg-American Line,* 290 U.S. 333, 350, 78 L. Ed. 348, 356.

In the case at bar one of the causes of damage relied upon by respondent is the "inherent vice or nature of the goods" (R. 483). One of the causes of damage specified in the third section of the Harter Act is "inherent defect, quality or vice of the thing carried". Respondent can, therefore, by virtue of the above decisions of this Court be exempt from liability for such cause of damage only upon affirmative proof that due diligence had been exercised to make its vessel in all respects seaworthy. Such proof was admittedly not made (R. 486).

Respondent pleaded in its answer, paragraph VI (R. 25):

> "The damage to libelant's goods of which libelant complains in its libel was entirely caused by natural decay and decomposition, resulting from the inherent nature of the goods and the fact that they were on board the vessel from October 26, 1936 to December, 1936, and to February 5, 1937."

The parties also stipulated that "The delay in voyage of said vessel and detention of said cargo for the period of time involved was the sole cause of such decay resulting from the inherent nature of the cargo" (R. 67).

Respondent cannot, therefore, escape liability by claiming that it relies on its unconditional bill of lading ex-

ception against damage due to "inherent vice or nature of the goods" and ignore the condition of such exemption granted by the third section of the Harter Act.

In *Martin v. The Southwark,* 191 U.S. 1, 48 L. Ed. 65, a cargo of fresh meat deteriorated due to its inherent nature when the refrigerating machinery ceased to operate. The carrier said it relied only on its bill of lading exceptions, but this Court held (page 8):

> "Before the passage of the act, the initial obligation could be limited in certain particulars by special contract not involving negligence of the owner. Since the passage of the act, *as to cases coming within its terms,* before the owner can have the benefit of the relief provided by Sec. 3, he must have exercised due diligence to provide a seaworthy vessel, capable of performing her intended voyage."
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> • • • • • • •

(Page 13):

> "The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier. As we have before stated, the right of the carrier to be exonerated *in the respects named in the Harter Act* depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel" (Our emphasis).

A carrier cannot, therefore, be permitted to nullify the Harter Act by relying on a bill of lading exception granting the benefit, but not assuming the burden provided for in the Act.

POINT C.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A VESSEL WHICH IS NAVIGATED WITHOUT HER FULL CREW, CONTRARY TO A STATUTE OF THE UNITED STATES, IS NOT UNSEAWORTHY, AND THAT THE CARRIER IS NOT LIABLE FOR DAMAGE TO CARGO ALTHOUGH IT FAILED TO PROVE THAT SUCH STATUTORY VIOLATION COULD NOT HAVE CONTRIBUTED TO THE DAMAGE, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

The Circuit Court of Appeals holds that the MAUI was not unseaworthy when respondent navigated her from her dock to an anchorage in San Francisco Bay, although during such navigation she did not have on board a substantial part of her required crew (R. 488).

Revised Statutes, Section 4463, as amended by Act of May 11, 1918, Chapter 72, section 1, 40 Stat. 548, 46 U.S. Code, section 222 provides:

> "No vessel of the United States subject to the provisions of this chapter or chapters 14 or 15 or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judgment of the local inspectors who inspect the vessel be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Secretary of Commerce, to the supervis-

ing inspector and from him to the Supervising Inspector General, who shall have the power to revise, set aside, or affirm the said determination of the local inspectors.

If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: PROVIDED, That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including certificated lifeboat men, separately stated, to the local inspectors within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of $50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500."

The MAUI was admittedly short twelve members of her deck crew for some time prior to and when she cast off her lines on order of respondent's operating manager (R. 212, 253, 361, 365). Twenty-one members of the engine-room crew also left the ship after her lines were cast off (R. 225, 243, 343). The vessel's required crew consisted of 53 men (R. 212).

The master did not testify that in his judgment the vessel was sufficiently manned. He made it quite clear

that he considered the vessel to be inadequately manned (R. 245, 246, 248, 255, 276). Respondent's efforts to secure crew replacements were made, as stated in the opinion, *after* the MAUI had been navigated from her dock to anchorage (R. 485).

A vessel navigated without the required crew in violation of the above statute is unseaworthy.

The Denali, 105 Fed. (2d) 413, 420, on rehearing 112 Fed. (2d) 952, 954 (9 C.C.A.);

The New York Marine No. 10, 109 Fed. (2d) 564, 566 (2 C.C.A.);

U. S. v. The Science, 27 Fed. Cas. No. 16,239 (W.D., Pa.);

Smith v. Northwestern Fire & Marine Ins. Co., 1928 A.M.C. 174, 179, 159 N.E. 87, 90, 246 N.Y. 349, 356.

In the case last cited, the late Mr. Justice Cardozo, then a member of the New York Court of Appeals, said:

> "We think the vessel sailed in an unseaworthy condition. She was without the complement of crew required by the statute. Such a vessel 'shall not be navigated unless she shall have in her service and on board such complement of officers and crew as may in the judgment of the local inspectors who inspect the vessel be necessary for her safe navigation,' R.S. 4463. The argument is made that less than the complement called for by the certificate of the inspectors sufficed for safe navigation while the vessel was still within the waters of the harbor. The judgment of a jury is thus to supplant the judgment of the public officers who have been charged with the duty of inquiry and decision."

Since the MAUI was navigated in violation of a statute, the burden rested on respondent to prove not merely that the navigation of the vessel in violation of the statute did not, but that it *could not* have contributed to the damage.

Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422, 34 L. Ed. 398, 403;

Lie v. San Francisco & Portland S. S. Co., 243 U.S. 291, 298, 61 L. Ed. 726, 733;

The Denali, 105 Fed. (2d) 413, 418 (9 C.C.A.);

The New York Marine No. 10, 109 Fed. (2d) 564, 566 (2 C.C.A.).

The Circuit Court of Appeals states in its opinion that the removal of the MAUI from her dock to the powder anchorage did not contribute to the delay of the voyage (R. 488). There is no finding that the violation of the statute did not contribute to the *damage*. There obviously can be no finding that such violation *could not* have contributed to the damage.

The Court found that the ship could not continue her voyage and could not return to her dock without a full crew (R. 485). Petitioners' cargo, therefore, remained on the ship for months at her anchorage and rotted. If the ship had remained at her dock, the cargo could have been discharged before the general maritime strike occurred. No one can now say that the vessel would not have secured a crew if she had remained at her dock. Other ships, including one operated by respondent, secured crews while at their docks (R. 355). Respondent claims that it could secure crews only through the unions. It was, therefore, not dealing with a few recalcitrant individuals who might

be coaxed out to a ship in the bay and then have to stay there. The unions naturally did not relish the idea of even polite shanghaiing.

Under the circumstances, respondent can hardly claim that its breach of the statute did not contribute to the damage. It certainly cannot now prove that such violation could not have contributed to the damage.

CONCLUSION.

Wherefore, petitioners respectfully pray that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final decree of said Court be reviewed and reversed.

Dated, San Francisco, California,
October 23, 1940.

Respectfully submitted,
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(Appendix Follows.)